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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits	)	

REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

May 12, 1993

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D. In Determining the Channel Occupancy Limits, the Commission Should Adopt a Limit High Enough--at Least 50% of Activated Channels--to Preserve the

Table of Abbreviations

Affiliated Regional Communications, Ltd.	("ARC")
Association of Independent Television Stations, Inc.	("INTV")
Bellsouth Telecommunications, Inc.	("BellSouth")
Cablevision Industries Corporation and Comcast Corporation	("CIC/CC")
Cablevision Systems Corporation	("Cablevision")
Community Broadcasters Association	("CBA")
Continental Cablevision, Inc.	("Continental")
David Waterman	("DW")
Discovery Communications, Inc.	("Discovery")
E! Entertainment Television, Inc.	("E!)
GTE Service Corporation	("GTE")
InterMedia Partners	("InterMedia")
International Family Entertainment, Inc.	("IFE")
Liberty Cable Company, Inc.	("LCC")
Liberty Media Corp.	("Liberty")
Motion Picture Association of America	("MPAA")
National Association of Telecommunication Officers and Advisers, the National League of Cities, the United States Conference of Mayors, and the National Association of Countries	("LG"); ("NLC")
National Cable Television Association	("NCTA")
National Private Cable Association, Maxtel Associates Limited Partnership, MSE Cable Systems and Pacific Cablevision	("NPCA")
Tele-Communications, Inc.	("TCI")
Time Warner Entertainment Company, L.P.	("TWE")
Turner Broadcasting System, Inc.	("TBS")
Viacom International, Inc.	("Viacom")

SUMMARY

The Commission should promulgate regulations that focus on the purpose of Section 11 while ensuring that the substantial benefits of horizontal and vertical relationships are preserved.

Subscriber Limits. TWE urges the Commission to follow the direction of virtually all commenters and adopt only national subscriber limits. The imposition of regional limits not only lacks support in the legislative history, but also may threaten the efficiencies afforded by some degree of regional concentration, including the ability to generate local programming.

Further, subscriber limits should take into account all methods of multichannel distribution. A subscriber limit that takes into account the number of subscribers to all multichannel distributors is a truer measure of any ability a cable operator may potentially have to thwart the distribution of a program service and is more consistent with legislative intent.

The commenters generally concur with TWE's proposal that a subscriber limit in the 30%-40% range would be appropriate. A limit in this range is consistent with the Commission's proposal and will not hamper the ability of programmers to reach a sufficiently large audience.

Among the commenters, there is widespread support for attribution criteria that focus on management control. TWE urges the Commission to reject the application of the 5% standard recently adopted under Section 19 of the Act.

TWE continues to support the position that enforcement responsibility should rest only with Commission and, along with all other commenters addressing the issue, opposes the implementation of a certification process. TWE also agrees with most commenters that a review every five years of subscriber limits will allow an appropriate amount of time to pass for industry trends to take shape

channels or, alternatively, should be added into the calculation according to the percentage of subscribers who receive them. In a similar vein, the channel occupancy limits should not apply to innovative multiplexed services, or, alternatively, a multiplexed service should only be regarded as a single service charged with occupying only one channel.

TWE urges the Commission to adopt the unanimously supported approach by applying the channel occupancy limits only to vertically integrated programmers who operate nationally. Further, the channel occupancy limits should apply only to programmers affiliated with the particular operator at issue. The Commission should follow its initial recommendation and implement regulations in accord with this broadly supported position.

TWE strongly urges the Commission to adopt a channel occupancy limit high enough--at least 50% of activated channels--to preserve the benefits of vertical integration. The Commission should also follow the recommendation advanced by several commenters and exempt vertically integrated programming services that have broad popularity among affiliated and non-affiliated systems. TWE specifically proposes that services that are received by

over 40% of the subscribers of non-affiliated cable systems nationally should be exempt.

Furthermore, the Commission should take into account emerging technologies by establishing a 54 channel threshold beyond which the channel occupancy limits would no longer apply. Virtually all commenters agreed that the limits should not apply in areas where effective competition exists. TWE reiterates its support for this approach.

TWE supports enforcement of the limits on a complaint basis only to provide consistency and uniformity in enforcement. Moreover, TWE urges the Commission to grandfather any existing vertically integrated relationships which exceed the limits.

Program Creation. The Commission should not impose any additional restrictions on the ability of multichannel distributors to engage in the creation and production of video programming.

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Preliminary Statement

Time Warner Entertainment Company, L.P. ("TWE"), submits these reply comments in response to comments responding to the Commission's Notice of Proposed Rulemaking ("NPRM") adopted December 10, 1992, and released December 28, 1992, regarding its rule-making responsibilities under Sections 11 and 13 of the Cable

the 1992 Cable Act violate its rights under the First Amendment to the United States Constitution. See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C., filed Nov. 5, 1992). TWE submits these comments without prejudice to its claims and arguments in those or any related proceedings.

I. SUBSCRIBER LIMITS

A. Virtually All Commenters Agree with TWE's Position That Only National Limits Should Be Prescribed.

In response to the Commission's inquiry as to "whether regional or national subscriber limits, or both" should be prescribed (NPRM at ¶ 35), TWE strongly urged that only national limits are appropriate (see TWE at 14-18). 1/ Six of the seven other commenters who addressed the issue came to the same conclusion. 2/

1/ Comments submitted to the Commission in response to its NPRM are cited by giving the submitter's name in abbreviated form and the page number of the cited material. For ease of reference, a table showing the abbreviations of various submitters' names that are used herein is included after the table of contents.

2/ The six other commenters favoring national limits are: TCI, Cablevision, Continental, CIC/CC, LBY, and NCTA. The only commenter taking a contrary position was INTV, who recommended the adoption of both national and local limits. INTV's position is discussed at pp. 4-5 below.

Commenters favoring national limits have articulated reasons very similar to those provided by TWE. They too have pointed out that the Commission has no authority to promulgate regional limits (see TWE at 14-17; TCI at 27-28; Cablevision at 3-4; Continental at 1; CIC/CC at 32; Liberty at 30-31; NCTA at 18-19), and that there is no suggestion in the congressional findings that cable operators possess undue power at a regional level or have distorted

economies of scale. Such economies permit, for example, expanded customer service and installation hours, the provision of which would not be economically feasible without wider regional distribution of the costs of equipment and service facilities. (See, e.g., Continental at 5-7; Cablevision at 3-7; CIC/CC at 33) In addition, the efficiencies associated with some degree of regional concentration permit cable operators to generate local programming that they otherwise could not generate. Such efficiencies would be jeopardized, and possibly eliminated, if subscriber limits were set on a regional basis. Section 11(c) requires the Commission to account for efficiencies gained through increased ownership and control. TWE agrees with these commenters that the efficiencies associated with regional concentration should be preserved, consistently with congressional policy.

INTV is the lone dissenting commenter. It supports national limits, but also supports subscriber limits at the local level. INTV urges the Commission to adopt subscriber limits within each Arbitron Area of Dominant Influence ("ADI"). (See INTV at 7-9)

TWE believes that INTV's suggestion should be rejected. As noted previously, neither the statute nor the legislative history focuses on concentration as an issue at

any level except the national level. 3/ There are no congressional guidelines to indicate what form such local limits would take, what problem they would respond to, or even whether there is a problem to which such limits would respond. Disregarding the efficiencies created by local and regional concentration, INTV merely asserts that no ill effects would result from local subscriber limits. INTV elsewhere acknowledges, however, that local ownership restrictions on television stations have had "perverse" anticompetitive effects. (INTV at 3 and n.4) There is no reason to expect any different result in the cable context.

B. The Subscriber Limits Should Be Calculated on a Basis That Takes Account of All Methods of Multi-channel Distribution.

In response to the Commission's inquiry as to whether subscriber limits should be based upon an operator's share of cable subscribers or its share of cable homes passed (NPRM at ¶ 36), most commenters have endorsed the homes passed method. (See Discovery at 8-9; TCI at 28-29;

3/ To be sure, the statute and the legislative history both assert that cable operators possess market power at the local level, but Congress was obviously concerned with the franchise area--not with an entire ADI--as the relevant geographic unit. Numerous other provisions of the 1992 Cable Act address any problems of perceived market power of cable operators at the local level. See, e.g., 47 U.S.C. § 543; 47 U.S.C. § 541.

MPAA at 5-6; INTV 5 and 8; LG at 20; NCTA at 14-15) In its Comments, TWE proposed a method that would compare the number of cable subscribers of a particular cable operator with the national number of subscribers to multichannel video services. 4/ (See TWE at 18-19) NCTA has proposed a similar measure. (NCTA at 15 n.31)

Two commenters, InterMedia and the National League of Cities (the "NLC"), have indicated that the Commission should base the subscriber limit calculation solely on cable subscribers, so that an operator's compliance would be gauged by dividing the number of its subscribers by the number of cable subscribers nationally. NLC simply assumes, in a passing comment in a footnote, that an actual cable subscriber standard should be employed. (See LG at 19 n.7) As the clear majority of commenters have noted, however, a measure based only on the number of cable subscribers: (a) discourages subscriber growth (TWE at 21; NPRM at ¶ 36; Discovery at 8; TCI at 14); (b) penalizes cable operators who gain new subscribers by providing diverse and high quality programming (TWE at 21; TCI at 14; Liberty at 31

4/ The measure that TWE has proposed has, (a) as its numerator, the number of cable subscribers served by the cable operator in question, and has, (b) as its denominator, the sum of (i) the number of all cable subscribers nationally and (ii) the number of subscribers to other multichannel video programming distributors. (TWE at 18-19)

n.11; NCTA at 14); and (c) is less stable than a homes passed standard because cable subscribership may fluctuate significantly over time (TWE at 21; NPRM at ¶ 36; MPAA at 6; INTV at 4 n.6; LG at 20).

InterMedia argues that a standard based solely on numbers of cable subscribers is appropriate since "[t]he Senate Report's findings which led to the adoption of this provision illustrated [its] concern[s] in terms of actual subscribers attributable to specific MSOs". (InterMedia at 8) In TWE's view, however, no particular significance should attach to the Senate's use of subscriber-based statistics. Congress plainly left the matter to the Commission's discretion.

InterMedia's next argument in support of an actual subscriber standard was somewhat unclear. It admonished the Commission to establish "national subscriber limits within the context of the overall structure of the Act". (InterMedia at 9) TWE certainly agrees with that approach. Next, InterMedia noted that multichannel video program distributors compete with cable operators, and that their service penetration "cannot even be expressed as a factor of homes passed". Thus, it concluded that to "assess accurately the state of competition" the Commission must use an actual subscriber method, or otherwise it would be unable

to "compare apples with apples". (Id. at 9) To the extent that InterMedia is suggesting that the Commission should look at all multichannel video program distributors in determining a cable operator's compliance with subscriber limits, InterMedia's position is fully in accord with TWE's.

As for InterMedia's third point, that "it is difficult to obtain accurate figures on homes passed on a given franchise area", we believe that "homes passed" figures are sufficiently accurate to serve as a measure. We note as a threshold matter that in the Commission's regulations implementing the now-superseded "effective competition" provisions of the Cable Communications Policy Act of 1984 ("1984 Cable Act"), the Commission used "homes passed" as a basis for determining whether "effective competition", as then defined, existed. See 47 C.F.R. 76.33(a)(2)(ii). Thus, it appears that the Commission has been of the opinion that accurate figures on homes passed are available. And clearly that is the case--"homes passed" is the industry's standard measure of a cable operator's penetration. It is used in industry reports, such as the Kagan census, and is used by cable operators in evaluating their business strategies.

Another commenter, GTE, proposed an altogether different measurement, one based on "total franchise-area

homes". (GTE at 2) That measure would incorporate the entire area that a cable franchisee is authorized to serve even though the franchisee may not have wired the entire area. TWE believes that that measure is inappropriate.

As an initial matter, there is no support for such a measure in either the Act or the legislative history. Moreover, we do not believe that such a measure would serve Congress's objectives effectively. Congress was concerned with cable operators' perceived ability to "impede the flow of video programming" to consumers. 47 U.S.C. § 533(f)(2)(A). A "total franchise-area" measure would not represent an accurate measure of an operator's ability to "impede the flow of programming". Where an operator has not yet laid cable, it can do nothing to prevent others from providing service. Indeed, where overbuilds exist, they frequently began because one operator proceeded to wire a portion of the franchise area where another operator had not yet commenced construction. Unbuilt areas are also often fruitful areas for SMATV operators and MDS or MMDS operators. 5/ The value of a cable operator to a programmer is not the total area that its franchise covers, but the

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5/ For example, in the outer boroughs of New York City, where construction of cable systems by franchised operators was delayed for many years as a result of litigation over the franchise, MDS operators stepped in and provided service.

total number of subscribers it has or, through better marketing, could have.

Finally, GTE's rationale that such a measure would encourage MSO's to grow by "completing their locally authorized construction", (GTE at 2), wrongly assumes that it would be economically feasible to do so. That may well be untrue in many cases. And, in any case, the local franchising authority often has the ability to require the cable operator to undertake such growth. In such cases, that should be sufficient, and the additional "incentive" GTE proposes is unnecessary.

C. The Consensus of Opinion Among Commenters Is That Any Horizontal Ownership Limit Should Be in the 30-40% Range.

The Commission has proposed a subscriber limit in the range of 25% to 35% of homes passed nationally and has sought comments as to the appropriateness of a limit in that range. TWE commented that a limit in the range of 30-40% is appropriate. (TWE at 21-29) Most other commenters proposed a percentage range generally consistent with TWE's proposed range. (See TCI at 17-27 (30-40%); Discovery at 9 (limit should be "well above 50%); NCTA at 15 (40%); MPAA at 5 (25%))

INTV, which recommended a 10% subscriber limit, is the only commenter to suggest a specific limit lower than that proposed by the Commission. (INTV at 6) 6/ INTV provided two reasons in support of its proposal. First, it argued that "Congress was concerned about the level of concentration in the status quo" and that therefore, Congress must have intended subscriber limits to be set low enough to change the status quo. 7/ (INTV at 4-5) INTV also argued that 10% is appropriate because the Commission has fixed a 10% limit in its network/cable cross-ownership rules. INTV's arguments are unfounded. More important, they do not address the concern of this section, that the flow of programming to consumers not be unfairly impeded.

6/ As discussed further below, commenter David Waterman argued that the Commission's proposed 25% to 35% limit might be too high, but did not present any concrete evidence to that effect and did not recommend a specific percentage limit.

7/ Recognizing that its stringent limit would require massive divestiture and that the Commission would be reluctant to impose such a harsh result, INTV proposed that the Commission apply the subscriber limits prospectively. (INTV at 6-7) "Thus, MSOs exceeding the benchmark would be precluded from increasing their cable system portfolios." (INTV at 7) Certainly, if such a stringent limit were adopted, divestiture would be inappropriate. In that regard, we note that the Senate Report stated that "the legislation does not imply that any company must be divested". S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("Senate Report"). (See also CIC/CC at 34 (divestiture not appropriate))

The 1992 Cable Act and its legislative history show that Congress never intended that subscriber limits be set below the level of the largest cable operator, TCI, at 24% of homes passed. For example, in its Report, the Senate stated that "the legislation does not imply that any company must be divested". Senate Report at 34. Congress was well aware that TCI had reached the 24% level. See Senate Report at 32; H.R. Rep. No. 628, 102d Cong., 2d Sess. 42 (1992) ("House Report"). Its statement that by calling for subscriber limits it did not mean to "imply that any company must be divested" strongly suggests that it believed the subscriber limit should be set at a level appreciably above 24%.

Further, Congress directed the Commission to prescribe "reasonable limits" on the number of cable subscribers a person is authorized to reach. 1992 Cable Act § 11(c), 47 U.S.C. § 533, as amended. While Congress nowhere in the Act expressly defined what it meant by "reasonable", clear indications of what Congress meant can be gleaned from the statute's requirements that the Commission: (a) ensure that cable operators cannot "unfairly impede" or "unreasonably restrict" the "flow of video programming" from programmers to consumers or to non-cable distributors; and (b) ensure that the regulations

adopted to accomplish that goal take into account the "efficiencies and other benefits" gained through cable

number of subscribers programmers can serve. The effect of an overly restrictive limit on cable systems would be to reduce--perhaps sharply--programmers' revenues." (Discovery at 5) Put another way, the Commission must recognize that a cable operator's possession of a large subscriber base can confer many benefits upon a programmer in the form of increased distribution, enhanced promotional abilities and opportunities, and transactional efficiencies. Setting the limit at the level proposed by INTV would curtail programmers' ability to reap these rewards, and would thus curtail the diversity of programming available to consumers. Further, a 10% limit would deprive cable operators of the economies of scale that their growth has made possible. And, in turn, consumers will be deprived of the benefits that flow from such efficiencies, including better service, better programming and more local programming. A 10% limit would therefore frustrate, not advance, Congress's intent.

INTV also argues that there is no reason why the 10% national ownership limit applicable in the network-cable cross ownership context (47 C.F.R. § 76.501) should not be applied here. (INTV at 6) We believe that there is, and that, if anything, the broadcast/cable cross-ownership rules

[redacted]

limit of 30% to 40% is appropriate. Recall that the Commission, having long ago recognized that broadcasters and cable operators compete with each other for consumer viewership, at one time barred broadcasters from entering the cable business out of fear that broadcasters would otherwise acquire too much power over television viewership. See In re Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, in MM Docket No. 82-434, 8 FCC Rcd 1184 (1993). The Commission has modified its view and now allows broadcasters who have as much as a 25% share of national television households to enter the cable business in areas they do not reach by their broadcast stations, but only so long as their share of cable subscribers does not exceed 10%. Those cross ownership limits, in effect, permit broadcasters to reach 35% of national television households--25% directly through broadcast and 10% through ownership of cable systems. Permitting such a 35% "reach" for broadcasters suggests that a subscriber limit for cable operators in the range of 30-40% is entirely appropriate.

Finally, economist David Waterman argues, in a letter and two attached papers submitted to the Commission,

that monopsony power effects may exist in programming acquisition even at levels of horizontal concentration below the 25% to 35% threshold suggested by the Commission. Waterman's analysis, however, is based on an assumed need for cable programming networks to reach almost all cable subscribers. Waterman rests this assumption on the premise that cable networks primarily offer original programming, the cost of producing which diminishes sharply, on a per-subscriber basis, as the service's subscriber base increases. In fact, however, few, if any, cable programming networks offer only original programming. Most services primarily offer programming licensed from others, as to which license fees typically increase as the size of the subscriber base increases. Thus, Waterman overstates the importance of universal distribution. Indeed, as TWE pointed out in its initial comments, many program services have proven to be viable with considerably less than universal distribution. (TWE at 27-28)

D. A Plurality of Commenters Believe That the Commission's Attribution Criteria Should Focus on Management Control.

The Commission has asked whether the attribution criteria set forth in 47 C.F.R. § 73.3555 are appropriate for determining ownership of cable systems in connection

with the application of subscriber limits. (NPRM at ¶ 38) TWE responded that those criteria were not appropriate. (TWE at 30) We suggested that the Commission should instead focus on the ability of an operator to control the particular cable system, since in the absence of control, an operator would have no power to direct the system's programming choices and thereby impede the flow of programming. (TWE at 30-31) Three other commenters support a control standard for similar reasons. (Discovery at 19-20; NCTA at 20-21; Liberty at 36-37) Thus, a plurality of the nine commenters who addressed this issue favored the control standard. 8/

MPAA and BellSouth asked the Commission to adopt the 5% attributable interest standard used for broadcasters. (MPAA at 6; BellSouth at 1-3) A third commenter, INTV, recommended the use of the even stricter cable-telco cross ownership standard. (INTV at 7) There is no reason, however, for applying such strict attribution criteria. Congress required the Commission to prescribe subscriber

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8/ TCI proposed a three-part test that would ignore an operator's interest in another cable system where its interest is 10% or less, or where another person owns an interest of 50% or greater in that cable system. TCI proposes a proration of the system's subscribers where an operator has an interest between 10% and 50%. (TCI at 13-14) We do not regard TCI's position as fundamentally inconsistent with TWE's.